

**REPORTABLE (12)**

**DIVINE MHAMBI HOVE  
v  
PARLIAMENT OF ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE  
GWAUNZA DCJ, GARWE JCC, MAKARAU JCC, GOWORA JCC, HLATSHWAYO  
JCC, PATEL JCC & GUVAVA AJCC  
HARARE 09 JUNE & 20 OCTOBER 2023**

*L Madhuku* for the applicant

*T Zhuwarara* for the respondent

**PATEL JCC:** At the end of proceedings in this matter, by unanimous decision, the Court issued an order as follows:

“1. It is declared that in respect of S.I. 144 of 2022, which was published in the *Gazette* dated 19 August 2022, the respondent failed to fulfil its constitutional obligation under section 152 of the Constitution. Judgment No. CCZ 12/23 Constitutional Application No. CCZ 12/23 1

2. The respondent is ordered to comply with its constitutional obligation under section 152 of the Constitution, by not later than close of business on the 16th of June 2023.

3. There shall be no order as to costs.

4. Reasons for this order are to follow in due course.”

The following are the reasons for the order handed down by the full bench of this Court.

**The Background**

The applicant is the President of a political party known as the Nationalists Alliance Party and is a member of the Political Actors Dialogue (“the POLAD”). He stood for election to the office of President during the 2018 harmonised elections. The respondent is the

Parliament of Zimbabwe, the constitutional organ reposed with primary law-making authority in Zimbabwe.

The petition before this Court is centred around the allegation that the respondent failed to fulfil its purported constitutional obligation of examining every statutory instrument published in the *Gazette* and considering whether any provision of the statutory instrument contravened any provision of the Constitution. More specifically, this contention relates to the Electoral (Nomination of Candidates) (Amendment) Regulations 2022 (No.1), Statutory Instrument 144 of 2022 (S.I. 144/22), which was published in the *Gazette* dated 19 August 2022.

The impugned statutory instrument was published by the Zimbabwe Electoral Commission (hereinafter “ZEC”) on the aforesaid date. It increased the nomination fee for aspiring presidential candidates in the imminent 2023 general elections and beyond, from US\$ 1,000 to US\$ 20,000. Similarly, the nomination fee for aspiring candidates for National Assembly and Senate elections was increased from US\$ 50 to US\$ 1,000. It is these hefty and apparently prohibitive hikes and, in particular, the perceived procedural irregularities that followed the promulgation of S.I. 144/22, that drew the ire of the applicant.

In his founding papers before this Court, the applicant averred that, as an ordinary citizen with aspirations to run for election as President, he would not be able to afford the US\$ 20,000 nomination fee. He added that none of the members of his political party would be able to afford US\$ 1,000 to run for public office as Members of Parliament.

Against this background, the applicant sought an order declaring that Parliament failed to fulfil its constitutional obligation in terms of s 152(3)(c) of the Constitution. It was contended that the respondent had an immutable obligation to examine every statutory instrument published in the *Gazette* and consider whether any provision of the statutory instrument contravened any provision of the Constitution. The applicant alleged that the respondent had failed to discharge this obligation in respect of S.I. 144/22. He based his standing on the belief that every citizen of Zimbabwe has automatic standing to challenge any failure by an institution of the State to fulfil a constitutional obligation.

It was the applicant's view that the use of the words "examine" and "consider" in the cited constitutional provision required the respondent to take a serious view of the imperative to protect the supreme law of the land. In this regard, it was contended that the respondent failed to fulfil its obligation in that it did not treat S.I. 144/22 in accordance with the provisions of s 152(3)(c), following which it should have produced a report on the constitutionality of the statutory instrument.

Alternatively, it was argued that the fact that the respondent did not find that the statutory instrument infringed the rights of citizens provided for and protected by s 67 of the Constitution was evidence of a failure to "examine" or "consider" the impugned regulations within the contemplation of s 152(3) of the Constitution. The appellant took aim at the respondent's perceived "lackadaisical" approach to S.I. 144/22, which conduct was alleged to have failed to meet the requirement to "examine" and "consider" within the meaning of s 152(3)(c).

The applicant averred that no reasonable Parliament acting in compliance with the mandatory obligation under s 152(3)(c) of the Constitution would have failed to consider that the regulations in SI 144/22 were patently unconstitutional for infringing the electoral and civil rights of citizens under s 67 of the Constitution. From the applicant’s perspective, had the respondent performed its constitutional obligation, the regulations ought to have been repealed or referred to this Court pursuant to para 9 of the Fifth Schedule to the Constitution. The requirement to pay the nomination fee expressly in United States Dollars was also stated to be an infringement of the rights contained in s 67 of the Constitution.

On the foregoing basis, the applicant sought the following order:

“1. That it be and is hereby declared that in respect of Statutory Instrument 144 of 2022 which was published in the *Gazette* dated 19th August 2022, the Respondent (Parliament of Zimbabwe) failed to fulfil its constitutional obligation under section 152(3)(c) of the Constitution of examining every statutory instrument published in the *Gazette* and considering whether any provision of the statutory instrument contravenes any provision of the Constitution.”

2. As a consequence arising from paragraph 1 of this order, that it be and is hereby declared that the Electoral (Nomination of Candidates) (Amendment) Regulations, 2022 (No. 1): Statutory Instrument 144 Of 2022 are null and void and of no force or effect.

3. There shall be no order as to costs.”

The respondent duly opposed the application. Its opposing affidavit was deposed to by Jacob Mudenda, the Speaker of the National Assembly. He refuted the allegation that the respondent had failed to fulfil a constitutional obligation. According to the respondent, the provisions of s 152(3)(c) of the Constitution were unambiguous — the obligation to examine every statutory instrument which had been published in the *Gazette* lay squarely on the Parliamentary Legal Committee (hereinafter “the PLC”). Accordingly, the said provisions did not impose a constitutional obligation on Parliament itself, as was alleged by the applicant.

Contrary to the applicant's averments, the respondent submitted that the PLC did consider the regulations on 26 September 2022 and thereafter resolved "not to issue a non-adverse certificate until they have had a meeting with the Zimbabwe Electoral Commission concerning the fees in Statutory Instrument 144 of 2022."

Consequently, the Clerk of Parliament wrote a letter on the same day to ZEC inviting it to appear before the PLC. By letter dated 28 September 2022, the Chief Elections Officer of ZEC advised the Clerk of Parliament that ZEC was constrained in discussing the matter as it was *sub judice*. According to the respondent, this was the sole reason that the PLC had postponed its consideration of the regulations until the High Court had passed its determination on their legality.

All in all, the respondent denied that the PLC had breached the Constitution in any way. In any event, the respondent assiduously sought to distance itself from assuming responsibility for the PLC's conduct. The respondent maintained that an alleged omission or breach by the PLC did not amount to failure by Parliament itself to fulfil a constitutional obligation.

#### Submissions by Counsel

Mr *Madhuku* for the applicant submitted that the applicant's *locus standi* was founded on s 2 of the Constitution. It was described as the supremacy clause which provided a basis for the applicant to vindicate the supremacy of the Constitution as a citizen. He submitted that the obligation in terms of s 152(3)(c) was imposed on Parliament by virtue of being specifically imposed on the PLC. He referred to decisions of this Court from which it could be inferred that the actions of the PLC were attributable to the respondent itself. He added

that the PLC, being a component of Parliament, was a functionary of the respondent and thus the cited obligation fell squarely upon the latter.

It was also contended that there were concessions on record by the respondent to the effect that it had not complied with its constitutional obligation. Mr *Madhuku* insisted that the said obligation could not be delayed by pending litigation on the same issue in the High Court. This was so despite the import of Standing Order 98(1)(e) of the National Assembly Standing Orders (Public Business) Ninth Edition 2020. The Standing Order provides that “no member shall while speaking to a question – (e) .... refer to any matter on which a judicial decision is pending”. He submitted that the Standing Order applied only in respect of non-constitutional issues. Mr *Madhuku* also argued that the applicant was entitled to rely on the competence of the first respondent to carry out its constitutional obligations and that any perceived failure to pursue an administrative law action ought not to non-suit him before this Court.

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*Per contra*, Mr *Zhuwarara*, for the respondent, submitted that the respondent had clearly fulfilled the constitutional obligation in question, contrary to the applicant’s position. He referred to minutes of the PLC on record as evidence that the respondent had considered the constitutionality of the impugned statutory instrument. He argued that the process thereafter was only stalled by ZEC’s refusal to engage the PLC due to the pendency of litigation in the High Court. He further reasoned that there was no timeline for submitting the report from the PLC to Parliament and that any order to that effect would be an undue intrusion into its domain.

In response, Mr *Madhuku* maintained that the PLC had a duty to examine and report on the constitutionality of the impugned statutory instrument. The two were deemed to be concurrent obligations that could not be separated as was argued on behalf of the respondent. In this respect, he referred to Standing Order 36(6)(d) which specifically stipulates a twenty-six day period for the PLC to submit its report to Parliament. After some initial reservation, Mr *Madhuku* accepted that a *mandamus* by the Court would be a competent remedy, consistent with the Court's authority under s 167(2)(d) of the Constitution to interfere with the respondent's processes.

### The Applicant's Legal Standing

The applicant's position, as elaborated in oral argument, is that he has approached the Court, not under s 85(1) but in terms of s 167(2)(d) of the Constitution. This forms the basis of his *locus standi* in this matter as a citizen of the country. As such, he has a right to assume *locus standi* to vindicate the supremacy of the Constitution in accordance with s 2 thereof. **Judgment No. CCZ 12/23**  
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*Per contra*, the respondent contends that the applicant appears to have conflated the provisions of paras (a), (c) and (d) of s 85(1) and thus has no standing to institute proceedings on behalf of himself as well as the general citizenry and members of his party.

It is trite law that standing is dependent on a direct and substantial legal interest in the subject-matter of the action, which interest could be prejudicially affected by the judgment of the court concerned. This is the basic test that is primarily applicable at common law. In constitutional cases, however, the test is not as restrictive but is significantly wider. It is necessary to adopt a broad approach to standing, consistent with the judicial mandate to uphold the Constitution and to ensure that constitutional rights enjoy the full measure of protection, particularly where a matter of public importance is involved. See *Ferreira v Levin*

*N.O. & Ors* 1996 (1) SA 984 (CC), at 1082 G-H; *Mawarire v Mugabe N.O. & Ors* 2013 (1) ZLR 469 (CC); *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 07-21, at p. 22.

*In casu*, it is abundantly clear that the respondent has misread the application. The applicant's references to s 67 of the Constitution are not intended to vindicate that right under s 85(1) but to demonstrate that the respondent ought to have found that the impugned statutory instrument violates a fundamental right. I have no doubt whatsoever that the applicant has established a proper basis for his standing in the present matter. He is a citizen with the noble aspiration of being elected to the office of President of the country. He must surely have a direct and substantial legal interest in any parliamentary process pertaining to the examination of the constitutionality of regulations governing the nomination of candidates for the presidency. Consequently, I am amply satisfied that the applicant is endowed with the requisite *locus standi in judicio* in the present matter.

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#### Compliance with the Requirements of Rule 27

Rule 27 of the Constitutional Court Rules 2016 (the Rules) sets out what must be pleaded in an application under s 167(2)(d) of the Constitution. The founding affidavit must explicate two elements: the constitutional obligation in question that is imposed on Parliament or the President; and that which Parliament or the President has failed to do in respect of the constitutional obligation. This Court has also prescribed that these two aspects must be set out with reasonable precision. The litigant must plead his or her case with sufficient clarity so that both the Court and the other parties know what is being alleged. See *Mliswa v Parliament of the Republic of Zimbabwe* CCZ 02-21; *Mushoriwa & Ors v Parliament of Zimbabwe* CCZ 04-23.



In the instant case, the applicant has identified the constitutional obligation that has not been fulfilled in fairly clear terms. This is the obligation imposed upon the PLC, in terms of s 152(3)(c) of the Constitution, to examine every statutory instrument published in the *Gazette*. The applicant has also identified Parliament, through the PLC, as the functionary that has failed to fulfil this obligation. Lastly, this failure on the part of Parliament has been elaborated with sufficient precision and clarity. Primarily, it is alleged that there is no report by the PLC demonstrating that S.I. 144/22 went through the procedure prescribed by s 152(3)(c). Alternatively, it is alleged that, even if that procedure had in fact been complied with, the failure by Parliament to find that S.I. 144/22 infringed the rights protected by s 67 of the Constitution evidenced a failure to “examine” and “consider” it within the contemplation of s 152(3)(c).

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Having regard to the foregoing, it is reasonably clear that the applicant has identified an alleged breach of a constitutional obligation that is averred to have been specifically imposed upon Parliament, through the PLC. I am accordingly satisfied that the applicant has properly pleaded a justiciable *causa* for the hearing and determination of this matter under s 167(2)(d) of the Constitution.

Once it is established that an applicant has properly pleaded his or her case in accordance with the requirements of r 27 of the Rules, this Court is at large to exercise its relatively broad jurisdiction under s 167(2)(d). For present purposes, what is to be considered is the procedural adequacy of the impugned law or conduct rather than the substantive validity of that law or conduct. Thus, the question to be adjudicated and determined *in casu* is

whether or not Parliament has followed and complied with due process in the performance of the specific obligation imposed by s 152(3)(c) of the Constitution.

#### Whether Obligation Imposed on the PLC or on Parliament

Before delving into the question posed above, it is necessary to deal with the position vehemently propounded by the respondent in its opposing affidavit. The gravamen of that position is the argument that the PLC is an entity separate and distinct from Parliament and that, consequently, the performance or non-performance of its functions cannot be imputed to Parliament itself.

I note at this stage that counsel for the respondent did not attempt to advance or ventilate this somewhat specious position, either in his heads of argument or in his submissions before the Court. Nevertheless, given the importance of the question, it demands a definitive answer so as to place the matter beyond doubt.

In motivating his position, the applicant relies upon the decision of this Court in *Gonese & Anor v President & Ors* 2018 (2) ZLR 670 (CC) for the submission that the obligation imposed by s 152(3)(c) of the Constitution lies squarely on Parliament itself, through the PLC. The applicant also relies on the case of *Doctors for Life International v Speaker of the National Assembly & Ors* 2006 (6) SA 416 (CC) for the argument that an obligation imposed on a component of Parliament is an obligation imposed on Parliament itself. The applicant further argues that parliamentary committees have no legal personality of their own and cannot be sued as separate legal persons because they are part and parcel of Parliament. Furthermore, the questions raised in the instant application not only involve an

intrusion into the domain of Parliament but also concern certain obligations of Parliament that are politically sensitive.

The respondent, *per contra*, relies upon the decision of this Court in *Mliswa's* case, *supra*, which concerned the disciplinary powers of the Speaker of Parliament. It was held, at p. 12 ff., that the power granted to the Speaker was independent of that given to Parliament and that it was not exercised on behalf of Parliament. It was further held that, where disciplinary authority and powers are conferred upon two functionaries, the exercise of power by one of them cannot be imputed to the other in the absence of clear provisions to that effect.

There is no doubt that the PLC is a creature that is *sui generis*. Although s 139(2)(b) of the Constitution states that Standing Orders may provide for the appointment and functions of committees and the delegation of functions to them, the PLC is not established in terms of that provision. Instead, s 152(1) provides that the Committee on Standing Rules and Orders must appoint the PLC as soon as is practicable after the beginning of each session of Parliament. Thus, the PLC is specifically established by *imprimatur* of the Constitution itself and Parliament has no discretion as to whether or not to establish the PLC.

Turning to “cases from across the Limpopo”, the decision of the South African Constitutional Court in the *Doctors for Life International* case, *supra* is particularly instructive. The position was taken, at paras 29 and 30, that an obligation imposed on a component of Parliament, in this instance, the National Assembly and the National Council of Provinces, is an obligation imposed on Parliament itself. Consequently, “if either of these democratic institutions fails to fulfil its constitutional obligation in relation to a bill, the result

is that Parliament has failed to fulfil its obligation”. In similar vein, in the case of *Land Access Movement of South Africa & Ors v Chairperson of the National Council of Provinces & Ors* 2016 (5) SA 635 (CC), at para 6, it was opined that “where either House fails to satisfy its own obligation .... in the process of making law, Parliament as a whole has failed in its constitutional obligation”.

Reverting to our own jurisdiction, the question that arose in *Gonese’s* case, *supra*, related to the allegation that Parliament had failed to fulfil its constitutional obligation in that, *inter alia*, the PLC had not performed its duty under s 152(3)(a) to examine every non-constitutional bill before it received its final vote in the Senate or the National Assembly. This Court proceeded on the clear basis that the obligation imposed upon the PLC was one that was imposed on Parliament itself. It was observed that “the duty vested in the PLC by the peremptory provisions of s 152(3) of examining every bill .... is a critical substantive obligation imposed upon the PLC to ensure that Parliament is fully apprised of any constitutional defect in proposed legislation ....”. Consequently, it was found that the alleged failure to comply with the provisions of s 152(3) was a matter that was “subject to the exclusive jurisdiction of this Court within the contemplation of s 167(2)(d) of the Constitution”.

In my assessment, the decision of this Court in *Mliswa’s* case, *supra*, is clearly distinguishable, having regard to the situation that arose in that case. The disciplinary power given to the Speaker was specifically independent of that given to Parliament. Again, the exercise of disciplinary authority and power by the Speaker could not be imputed to Parliament in the absence of clear provisions to that effect. And lastly, there was no factual or

legal basis for finding that Parliament had any supervisory role over the Speaker in matters concerning the discipline of its Members.

On a proper analysis of the situation *in casu*, I take the view that it is fundamentally different from that in *Mliswa's* case. First and foremost, the obligation imposed upon the PLC to examine every statutory instrument in terms of s 152(3)(c) and to submit its report to Parliament is designed to apprise Parliament of any constitutional defect in instruments that have been promulgated. As was aptly recognised in *Gonese's* case, *supra*, the purpose of this exercise is to enable Parliament “to rectify such defect in order to secure due conformity with the Constitution”. In essence, the obligation of the PLC under s 152(3) is not a stand-alone function in which the PLC acts as an autonomous monitoring body. On the contrary, it is an intrinsic component of the overall legislative process of Parliament as the primary law-making authority under the Constitution. In the performance of its scrutiny functions under s 152(3), the PLC constitutes a necessary adjunct of Parliament itself, acting under its aegis and oversight, with the ultimate objective of securing the constitutional integrity of all proposed and published legislation within its prescribed remit. In the premises, I conclude that the obligations imposed on the PLC, in terms of s 152(3) as a whole and by s 152(3)(c) in particular, are obligations that are imposed upon Parliament as the ultimate legislative authority. Accordingly, any failure on the part of the PLC to fulfil any of its obligations under s 152(3) constitutes a failure to fulfil a constitutional obligation by Parliament itself.

I am fortified in this conclusion from a broader perspective. Generally speaking, Parliament carries out its legislative functions through the National Assembly and the Senate as well as the panoply of committees that operate under the auspices of both Houses of Parliament. While some of the actions of certain officials, such as the Speaker and the

President of the Senate, may not be imputed directly to Parliament, the juristic acts of its committees are invariably attributable to Parliament. Such committees exist purely to carry out the functions of Parliament itself. Equally importantly, the committees of Parliament do not have any legal *personae* of their own and cannot sue or be sued *in suis nominis*. In short, the committees of Parliament, including the PLC, exist and operate as necessary appendages of Parliament itself.

### Functions and Obligations of the PLC under Section 152(3)

Section 152(3), in its relevant portions, provides as follows:

“The Parliamentary Legal Committee must examine – .... (c) every statutory instrument published in the *Gazette*; .... and must report to Parliament .... whether it considers any provision in the .... statutory instrument .... contravenes or, if enacted, would contravene any provision of this Constitution.” (my emphasis)

The obligation of the PLC under para (c) of s 152(3) is self-evident. It is essentially two-fold: to examine every statutory instrument published in the *Gazette* and to report to Parliament on the constitutionality or otherwise of the statutory instrument. The two functions are not only mandatory but are also conjunctive. The examination of an instrument without the submission of a report thereon does not suffice to satisfy the obligation imposed upon the PLC by s 152(3)(c). Moreover, by dint of s 324 of the Constitution, “All constitutional obligations must be performed diligently and without delay.”

Mr *Zhuwarara*, for the respondent, accepts that the PLC is obligated to examine every statutory instrument but contends that it is only required to submit its report to Parliament, or other functionary identified in s 152(3), where it decides to issue an adverse report on the instrument. This would be the case both where the PLC considers the instrument to be in contravention of the Constitution, as *per* s 152(3), or where it deems it to be *ultra vires* its

enabling Act, as *per* s 152(4). Thereafter, the adverse report is debated by the National Assembly and the Senate.

Mr *Madhuku*, for the applicant, contends otherwise. He submits that the PLC must examine and report on every statutory instrument. Whether its report is adverse or not is quite immaterial in determining the constitutionality or *vires* of the instrument. In this respect, the PLC cannot justify the need to consult ZEC in delaying the submission of its report.

I fully agree with counsel for the applicant. Firstly, I am unable to find anything in s 152 or elsewhere in the Constitution to justify the contention that the PLC's obligation to present its report on the constitutionality or otherwise of statutory instruments is confined to those instances where it decides to issue an adverse report on the instrument under consideration. Secondly, the PLC's functions under s 152(3) are peculiar to its own mandated obligation thereunder and must be fulfilled independently of any other institution or public office. In this connection, the PLC cannot invoke the need to consult or interact with ZEC as a valid ground for withholding the submission of its report to Parliament. To do so would be to violate the constitutional injunction to perform its obligation diligently and without delay.

#### Standing Orders 33 and 98

In assessing the functions of the PLC, it is necessary to have regard to certain provisions of the National Assembly Standing Orders (Public Business), 9<sup>th</sup> edition, 2020. The conduct of the proceedings of the PLC is governed by Order 33. In terms of suborder (6) (d), the PLC must present its report to the House, in the case of a statutory instrument published in the *Gazette*, within a period of twenty-six business days beginning on the first day of the month next following the month in which the instrument was published. By virtue

of suborder (7)(a), the Speaker in consultation with the President of the Senate may, upon application by the Chairperson of the PLC, extend that period for a further period of twenty-six business days. The Speaker may do so, if he or she considers it proper on account of the length or complexity of the instrument or the prevailing workload of the PLC or for any other sufficient reason.

Turning to Order 98, which prescribes the rules to be observed by Members, suborder (1)(e) stipulates that "No member must, while speaking to a question – .... (e) refer to any matter on which a judicial decision is pending; .... " The other restrictions placed upon Members relate to, *inter alia* the irreverent use of the name of the President, inappropriate references to other Members, the use of derogatory, disrespectful, offensive or unbecoming words, using the right of speech for the purpose of obstructing proceedings of the House, and anticipating the discussion of any other subject which appears on the Order Paper.

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Having regard to suborder (1)(e) in particular, the question that arises is whether or not the PLC was justified in withholding its report on the constitutionality or otherwise of S.I. 144/22. The respondent's position in this respect is that the PLC was so justified so as to avoid canvassing issues that were *sub judice* before the High Court in Case No. HC 6083/22. Mr *Zhuwarara* submits that Order 98(1)(e) precludes any comment on any matter pending before any court. In this case, the PLC had already taken the view that the impugned statutory instrument did not violate the Constitution and was simply awaiting consideration of the statutory *vires* of the instrument as envisaged by s 152(4) of the Constitution. Mr *Zhuwarara* further relies on Standing Order 33(3) which enables the PLC to receive such evidence as is required for the performance of its functions in terms of the Constitution. The PLC was



therefore entitled to await the views of ZEC before concluding and submitting its report on both the constitutionality as well as the *vires* of S.I. 144/22.

Mr *Madhuku*, on the other hand, submits that Order 98(1)(e) relates to the decorum of Members when speaking in Parliament. It does not impact upon the obligation of the PLC under s 152(3) of the Constitution to examine and report on every published statutory instrument. The restriction imposed by suborder (1)(e) is subordinate to the obligation of the PLC to fulfil its constitutional functions and is not relevant to the performance of those functions. Mr *Madhuku* also relies on the timeline requirement of twenty-six days stipulated by Order 33(6)(d), within which period the PLC is enjoined to submit its report to Parliament. This timeframe must be complied with and does not permit any delay based on the need to consult or take evidence from other public bodies.

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Having regard to the wording of Order 33(3), there can be no doubt that the PLC was duly authorised to receive evidence from ZEC in the process of conducting its examination of S.I. 144/22. The more critical question is whether or not it was entitled to wait indefinitely in so doing. Given the peremptory language of Order 33(6), spelling out “the periods within which the [PLC] must report to the House”, the answer to this question must be given in the negative. The impugned statutory instrument was promulgated on 19 August 2022. Allowing for the period of twenty-six business days prescribed by suborder (6)(d), coupled with the additional twenty-six business days permitted by suborder (7)(a) – assuming that the PLC had applied for and been granted this extension – the deadline for the submission of the PLC’s report to Parliament would have expired in the middle of November 2022. As at the date when this matter was heard, *i.e.* in June 2023, the time that had elapsed was a period of seven

months beyond the stipulated deadline. This is patently outside the timeframe contemplated by Order 33(6)(d).

The next question concerns the requirements of Order 98(1), and suborder (1)(e) in particular. It stipulates that “No Member must, while speaking to a question .... refer to any matter on which a judicial decision is pending”. The argument that the remainder of Order 98(1) is largely devoted to issues pertaining to the decorum and proper conduct of Members during the course of proceedings is fairly attractive. However, I do not think that the broader context of Order 98(1) can legitimately be allowed to detract from the specific stricture contained in suborder (1)(e). It is *sui generis* in nature and its mandatory prohibition cannot be disregarded. Whether it is applicable and enforceable *in casu* is an entirely separate matter.

It cannot be disputed that Order 98(1)(e) is quite obviously an extant law in the  
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broadest sense and that it must therefore be complied with unless and until it is set aside. See *Biti & Anor v Minister of Justice, Legal and Parliamentary Affairs & Anor* SC 10-02. On the other hand, the injunction embodied in s 152(3) of the Constitution is unequivocally clear. The PLC “must examine” every published statutory instrument and thereafter “must report to Parliament” on the constitutionality or otherwise of the instrument so examined. In my opinion, the PLC is duty bound to carry out both of those functions notwithstanding anything to the contrary contained in the Standing Orders of Parliament. Section 152(3) undoubtedly constitutes a normative injunction of a higher order, while Order 98(1)(e) must be regarded as a subordinate or subservient norm, which must therefore defer and succumb to the superior authority of s 152(3). To the extent that Order 98(1)(e) is inconsistent with or prejudices the fulfilment of the obligation mandated by s 152(3) of the Constitution, it is the latter that must

prevail. And I am amply fortified in this approach from my analysis of the purpose of the *sub judice* rule and the established qualifications to that rule.

### The Sub Judice Rule

The term *sub judice* is defined in *Black's Law Dictionary* as meaning "before a court or judge for determination". Depending on the circumstance or setting of its usage, it may be viewed as a rule of court, a statutory rule, a parliamentary convention or simply a practice that has developed in the interaction between the media and public officials. At its core, it is aimed at preventing the publication of statements that may prejudice court proceedings.

In the context of the present case, the focus of the *sub judice* rule is centred on the relationship between Parliament and the judiciary under the lens of the separation of powers doctrine. To what extent can Parliament deal with a matter that is the subject of legal proceedings in a court of law? The question emanates from the clearly defined constitutional parameters of the two institutions as explicated in the celebrated case of *Smith v Mutasa & Anor* 1989 (3) ZLR 183 (SC), at 192 D-H. The general principle is that when the judiciary is seized with a matter, even Parliament has to defer to the judicial process.

The primary purpose of the *sub judice* rule is to obviate a real risk of interference with the due administration of justice. See *S v Hartmann & Anor* 1983 (2) ZLR 186 (SC), at 196 F-H. It is aimed at preventing external factors from influencing the determination or outcome of legal proceedings and, consequently, the course of justice. See *Kwaramba v Bhunu N.O.* 2012 (2) ZLR (S) at 367 C-E. The specific duty of Parliament to observe the *sub judice* rule was expressly recognised and reaffirmed in *Zvoma N.O. v Moyo & Ors* 2012 (1) ZLR (H),

at 124 E-F. The rule is recognised as an essential component of the rule of law and, from that perspective, as binding on the conduct of Parliament.

Having set out the underlying objective of the *sub judice* rule, I turn to consider the extent to which it may be qualified or departed from in practice. And in the particular context of the present matter, to what extent can Parliament, through the PLC, resile from the *sub judice* rule in fulfilling its obligations under s 152(3) of the Constitution?

In the United Kingdom, the *sub judice* rule has been formalised and entrenched in its parliamentary practice, both in the House of Lords and in the House of Commons. As appears from *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (21<sup>st</sup> edition, 2007):

“The privilege of freedom of speech in Parliament places a corresponding duty on members to use the freedom responsibly. This is the basis of the *sub judice* rule. Under the rule both Houses abstain from discussing the merits of disputes about to be tried and decided in the courts of law.”

The 2007 *Companion and Guide* also cites a resolution adopted by the House of Lords on 11 May 2000, which reads as follows:

“That, subject to the discretion of the Lord Speaker, and to the right of the House to legislate on any matter or to discuss any delegated legislation, the House in all its proceedings (including proceedings of committees of the House) shall apply the following rules on matters *sub judice* ....” (my emphasis).

This approach is also confirmed *vis-à-vis* the House of Commons by Erskine May: *Parliamentary Practice*, (21<sup>st</sup> edition, 1989):

“The House has resolved that no matter awaiting or under adjudication by a court of law should be brought before it by a motion or otherwise. .... This rule may be waived at the discretion of the Chair. .... The general rule also applies to motions for leave to bring in bills but the House has expressly resolved that the *sub judice* rule is qualified by the right of the House to legislate on any matter.” (my emphasis)

The foregoing exposition demonstrates that the *sub judice* rule is firmly established in the parliamentary practice and procedures of both England and Zimbabwe. However, it also demonstrates that the rule is not absolute or immutable and has been qualified through proactive parliamentary practice designed to facilitate and enhance the performance of parliamentary duties and functions. Furthermore, with particular reference to England, the rule is explicitly qualified by the right of Parliament to legislate on any matter or to discuss any delegated legislation.

The latter qualification is of singular significance in the context of the present application. This arises from the provisions of ss 3 and 4 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*]. By virtue of s 3(b) of the Act:

“Parliament and members and officers of Parliament shall hold, exercise and enjoy –  
.... (b) all such other privileges, immunities and powers .... as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on the 18<sup>th</sup> April 1980.”

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The provisions of s 3(b) are buttressed by s 4 which stipulates that:

“The privileges, immunities and powers of Parliament and members and officers of Parliament shall be part of the general and public law and it shall not be necessary to plead them but they shall be judicially noticed in all courts.”

The intention and effect of these provisions are unquestionably clear. Our Parliament, as well as its members and officers, enjoy the same privileges, immunities and powers as were applicable and enjoyed in the House of Commons as at 18 April 1980.

As I have earlier postulated, the PLC is an intrinsic and essential component of Parliament itself. By the same token, the procedures and functions of the PLC are inextricably intertwined with the legislative processes of Parliament. Thus, when the PLC is engaged in performing its functions under s 152(3) of the Constitution, it is also involved in

exercising the power and right of Parliament to legislate on any matter or to discuss any delegated legislation. On that premise, having regard to the established practice of the House of Commons, the PLC should not be hamstrung by the strictures of the *sub judice* rule in the course of examining and reporting on legislation under s 152(3) of the Constitution. In short, for this reason and the reasons stated earlier pertaining to the subordinate status of Standing Orders generally, the *sub judice* restriction imposed by Standing Order 98(1)(e) does not apply to the circumstances of the present matter.

### Whether the PLC Fulfilled its Obligation

In its opposing affidavit, at paras 6.5 to 8.2, the respondent makes the following averments: (i) The PLC postponed consideration of the matter until the High Court has made its determination; (ii) Parliament has not yet received the PLC's report as the PLC is waiting for the finalisation of Case No. HC 6083/22; (iii) The issue of nomination fees will be considered by the PLC after finalisation of Case No. HC 6083/22; (iv) No report has been placed before Parliament for consideration as the matter is still pending before the High Court.

Mr *Zhuwarara*, for the respondent, notes that the PLC did examine all the statutory instruments which had been published in August 2022, including S.I. 144/22. The PLC found that none of these instruments was in violation of any provision of the Constitution. However, the PLC resolved not to issue a non-adverse certificate until they had a meeting with ZEC. This was clearly reflected in the minutes of the PLC, dated 26 September 2022. Accordingly, so submits Mr *Zhuwarara*, the PLC did carry out its constitutional obligation to analyse S.I. 144/22 and did take a view as to its constitutionality.

As I have already stated, the obligation imposed on the PLC under s 152(3)(c) of the Constitution is two-fold. The first function is to examine every statutory instrument published in the *Gazette*. The second function is to submit its report to Parliament, within the stipulated timeframe of twenty-six or fifty-two business days, as the case may be, as to the constitutionality or otherwise of the instrument. These two functions are disparate but conjunctive. The performance of the former without completing the latter does not serve to satisfy the two-fold requirements of s 152(3)(c).

*In casu*, it is abundantly clear that the PLC did examine the impugned statutory instrument. Whether it did so in a lackadaisical or cursory fashion is immaterial for present purposes. What matters is that it did not at any stage, let alone within the prescribed maximum time limit of fifty-two working days, submit to Parliament its report on the constitutionality of S.I. 144/22. Pursuant to the jurisdictional remit of this Court under s 167(2)(d) of the Constitution, I accordingly conclude that Parliament, acting through the PLC, failed to fulfil its constitutional mandate and obligation under s 152(3)(c) of the Constitution.

#### The Availability of Alternative Remedies

According to the respondent, the present application is one for a review of the impugned statutory instrument rather than the constitutionality of the PLC's conduct. Therefore, the applicant should instead have approached the High Court for review under the Administrative Justice Act [*Chapter 10:28*] on the basis that ZEC's decision to set the high nomination fees was either unlawful or irrational. This argument essentially invites the Court to apply the twin doctrines of subsidiarity and avoidance as well as the associated concept of ripeness.

I fully agree that S.I. 144/22 could have been subjected to review on established administrative law grounds. Nevertheless, I take the view that this possibility does not necessarily bar or preclude the applicant from bringing the present application to this Court. Properly regarded, an administrative law action on the basis of gross unreasonableness is essentially a cause of action intended to vindicate the fundamental right to administrative justice under s 68(1) of the Constitution, as read with the *locus standi* requisites prescribed by s 85(1). This is quite distinct from a cause of action under s 167(2)(d) of the Constitution which is a special procedure designed to redress an alleged failure on the part of the President or Parliament to fulfil a constitutional obligation. Thus, where the facts of any case give rise to alternative causes of action under both Chapter 4 and s 167(2)(d) of the Constitution, a litigant cannot be barred for opting to proceed under s 167(2)(d). This is particularly so given the overarching need for constitutional obligations to be performed ~~timeously and diligently,~~ as is dictated by s 324 of the Constitution. Consequently, the respondent's objection in this regard lacks merit and is therefore dismissed.

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### The Appropriate Remedy

The relief sought by the applicant is two-pronged. The first prong is a declaration that the respondent failed to fulfil its constitutional obligation under s 152(3)(c) of the Constitution in respect of S.I. 144/22. The second prong is a declaration that the Regulations embodied in S.I. 144/22 are null and void and of no force or effect.

Section 175(6) of the Constitution sets out the powers exercisable by the courts when dealing with constitutional matters. It provides as follows:

“When deciding a constitutional matter within its jurisdiction a court may –



- (a) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;
- (b) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.”

Mr *Madhuku* initially argued that, once the Court decides to grant the first declarator, the only just and equitable remedy available was to set aside or invalidate the impugned statutory instrument. The remedy granted must vindicate the Constitution and the Court has a special role to deal with sensitive political matters. He further argued that, while an order of *mandamus* was acceptable, the more effective remedy was to set aside S.I. 144/22.

Mr *Zhuwarara* countered that neither remedy was acceptable. In any case, he was averse to an order of *mandamus* as the PLC had not as yet completed its process of examining the impugned instrument. The PLC was awaiting a dialogue with ZEC before issuing its adverse report or non-adverse certificate.

In the peculiar circumstances of this case, I take the view that a declaration of nullity or invalidity would be inappropriate and incompetent, even though that might settle the question as to the intrinsic constitutionality of S. I. 144/22. Firstly, the Court cannot deal with that question because the applicant has not directly asked it to do so. Secondly, the basis of the declaration of invalidity sought by the applicant, as it appears from the draft order, is that S. I. 144/22 be declared invalid as a specific consequence of the respondent’s failure to examine the instrument, and not because it was inherently unconstitutional. I do not think that this is legally permissible, as the validity of a statutory instrument, including S. I. 144/22, does not depend upon whether or not the PLC has examined it. Paragraph 9(1) and (2) of the Fifth Schedule to the Constitution stipulates the procedure to be followed when the PLC

reports adversely on a statutory instrument to Parliament. In effect, even if the PLC and Parliament have resolved that the instrument is unconstitutional, it remains in force until it is repealed by the authority which enacted it (in this case ZEC) or is declared to be invalid by this Court. In short, a statutory instrument cannot become invalid simply because the PLC has failed to examine it.

In the considered opinion of the Court, the most just and equitable order, and therefore the most appropriate remedy *in casu*, is an order of *mandamus* calling upon the respondent to comply with its constitutional obligation under s 152 of the Constitution within a specified period. This accords with the jurisdictional competence of the Court to order Parliament to conclude its mandated process and thereby vindicates the obligation to fulfil the peremptory requirements of s 152 of the Constitution.

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It is for the foregoing reasons that the Court delivered the order set out at the beginning of this judgment.

GWAUNZA DCJ:	I agree
GARWE JCC:	I agree
MAKARAU JCC:	I agree
GOWORA JCC:	I agree
HLATSHWAYO JCC:	I agree
GUVAVA AJCC:	I agree

*Lovemore Madhuku Lawyers*, applicant's legal practitioners

*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners